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In the Supreme Court of the United States

October Term, 1978

Number 78-1127

ROBERT W. BRADFORD, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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January 10, 1979

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ROBERT W. BRADFORD, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The petitioner, ROBERT W. BRADFORD respectfully prays that a writ of certiorari issues to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on October 26, 1978.

OPINION BELOW

The opinion of the Court of Appeals, which was reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 26, 1978. A timely petition for rehearing, or, in the alternative, for transfer to the Court *en banc* was denied on December 18, 1978, and this petition for certiorari was filed within thirty

days of that date. This Court's jurisdiction is revoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied Due Process and the right to a Fair Trial by the trial court's refusal to permit petitioner to present defenses of justification, coercion and Governmental Misconduct.

2. Whether petitioner was placed in Double Jeopardy by being sentenced to consecutive sentences on the two counts of conspiracy to violate Title 18 United States Code, sections 371 and 545.

3. Whether petitioner's conviction of smuggling in Count 3 is in conflict with decisions of the Second and Ninth Circuits.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §371: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. § 545: "Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner

facilitates the transportation, knowing the same to have been import or brought into the United States contrary to law —

Shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States . . . . ."

STATEMENT OF THE CASE

Petitioner Bradford joined an on-going conspiracy, involving 18 individual defendants, these corporate defendants, and numerous unindicted co-conspirators, to smuggle and distribute Laetrile throughout the United States. Petitioner was convicted of two counts conspiracy to smuggle, and to receive smuggled merchandise (18 U.S.C. 371, 545) and three substantive counts of smuggling or receiving smuggled merchandise (18 U.S.C. 545).

The Laetrile conspiracy began in September, 1971, with the construction of Cyto Pharma, a Laetrile manufacturing plant in Tijuana, Mexico, and the "underground railway" to smuggle the Laetrile into the United States and to distribute it to cancer patients by mail and common carrier.

Petitioner Bradford was President and one of the founders of the Committee for Freedom of Choice in Cancer Therapy (450 chapters, a National Headquarters, over 25,000 members), a non-profit corporation formed in January, 1973, and advocating the legalization and use of Laetrile by physicians as a valid modality of treating cancer.

Petitioner, prior to entering into distribution of Laetrile in early 1973, was advised by attorney George Kell (1) that Laetrile could be legally imported; (2) the Federal Food and Drug Administration could not lawfully prohibit the importation of Laetrile because the F.D.A. had failed in its duty to conduct hearings to determine whether Laetrile was a "new drug" or exempt under the "grandfather" clauses of the Federal Food, Drug & Cosmetic Act (R.T. 4558:18-4736:22; Cf. *Rutherford v. U.S.* (CA 10, 1976), 542 F.2d 1137; and (3) that the justification of acting to save human life would be a valid defense to charges arising from importing and distributing Laetrile.

Thereafter, Petitioner became a major distributor of Cyto Pharma Laetrile. Petitioner, as President of the Committee for Freedom of Choice, also conducted public education and medical training programs, supported scientific and medical research programs pertaining to Laetrile, lobbied for State and Federal recognition of Laetrile, and participated in the *Rutherford* cases[1], which successfully enjoined the F.D.A. from prohibiting the importation of Laetrile. (R.T. 4868:6-4901:8).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DENYING PETITIONER THE RIGHT TO PRESENT THE DEFENSES OF JUSTIFICATION AND COERCION TO THE JURY IS WRONG IN LIGHT OF GENERAL PRINCIPLES OF LAW AND DENIED PETITIONER HIS 6th AMENDMENT RIGHT TO A FAIR TRIAL.

[1]*Rutherford v. U.S.*, 399 F. Supp 1208 (WD Okla, 1975); 542 F.2d 1137 (CA 10, 1976); 424 F.Supp 105 (WD Okla, 1976); 429 F.Supp 506 (WD Okla, 1976); 438 F.Supp 1287 (WD Okla, 1977); 582 F.2d 1234 (CA 10, 1977), presently on petition for certiorari to the United States Supreme Court, Nos. 78-605 and 78-763.

Petitioner's conviction cannot be squared with the 6th Amendment right to a Fair Trial. The trial court's decision to eliminate petitioner's right to present the defenses of justification and coercion effectively curtailed petitioner's right to jury trial, and stands in conflict with general common law principles pertaining to these defenses.

The ALI Model Penal Code, section 3.02, has summarized the common law defense of necessity or justifiable conduct as follows:

> "1. Conduct which the actor believes necessary to avoid an evil to himself or to another is justifiable, provided that:
>
> (a) the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exemptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear;
>
> 2. When the actor was reckless or negligent in bringing about the situation requiring a choice of evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability."

Cf. *U.S. v. The Diana*, 7 Wall. 35, 19 L.Ed. 165; *Regina v. Dudley and Stephens*, L.R. 14 Q.B.D. 273 (1884); *U.S. v. Ashton*, 24 Fed. Cas. 873, No. 14470 (C.C.D. Mass 1834), *U.S. v. Holmes*, 1 Wall Jr. 1 (C.C.D. Pa. 1842), *U.S. v. Nye*, 27 Fed.Cas. 210, No. 15, 906 (C.C.D. Mass 1855), *U.S. v. Staly*, 27 Fed. Cas. 1290, No. 16734 (C.C.D. R.I. 1846), *State v. Jackson*, 71 N.H. 552, 53 Atl. 1021 (1902), *C&O Ry. Co. v. Commonwealth*, 119 Ky 519, 84

S.W. 566 (1905), *Bice v. State*, 109 Ga. 117, 34 S.E. 202 (1899), *People v. Whipple*, 100 C.A. 261, 279 P. 1008 (1929), *U.S. v. Simpson*, 460 F.2d 515 (CA 9, 1972), *U.S. v. Kroncke*, 459 F.2d 697 (CA 8, 1972), *U.S. v. Mowat*, 582 F.2d 1194 (CA 9, 7/18/78), *U.S. v. Randall*, (DC Supr.Ct. 11/24/76), 20 Cr.L. 2299.

The United States Court of Appeals for the Ninth Circuit held petitioner was not entitled to this defense (Opinion, Appendix A, pages 4-5) because:

> "The defense of necessity, where it is recognized to exist, is hedged about with many conditions, at least one of which would prevent is application here: "The assertion of the necessity defense requires that optional courses of action appear unavailable" . . . Here the obvious optional course of action was to take steps to render the "necessary" action legal — to pursue the course taken in *Rutherford v. United States*, ... in seeking to have the FDA classification of Laetrile set aside or to have it approved as a new drug . . ."

In so ruling, the Ninth Circuit ignored the "imminent harm" aspect of the Common Law definition of necessity. By offer of proof at trial petitioner established by expert medical and scientific evidence that (1) cancer kills quickly, horribly and painfully; and (2) the ineffectiveness of conventional cancer therapies (R.T. 4653:16-4659:23), (2) the immediate analgesic or pain-relieving attribute of Laetrile (R.T. 5173:8-5151:17), (4) the life-preserving attributes of Laetrile (R.T. 5851:1-5852:20, 4935:22-4946:22, 5425:14-5427:5, 5426:14-5429:2), and (5) that the course pursued in *Rutherford v. United States, supra*, begun in June, 1974, after several false starts and presently on appeal to this Court some five years later, would require so much time that 92-1/2% of the cancer patients would have died (R.T. 5150:10-5151:6). While litigation a la *Rutherford* would provide the

'optional course' suggested by the Court of Appeal, it does nothing to alleviate the "imminent harm" in the interim five year period.

While it is for the trial court to determine whether an affirmative defense may be presented (*U.S. v. Glasser* (CA9, 1977), 550 F.2d 483, 487), this Court has ruled that an erroneous ruling excluding a proper defense violates due process and the Sixth Amendment right to a fair trial (*Goldberg v. Kelly*, 397 U.S. 254 25 L.Ed. 2d. 287, 90 S.Ct. 1101), as happened in the present case.

Likewise, the trial court denied petitioner his right to present the defenses of coercion. Coercion is a recognized defense where the crime is committed under a present, immediate, impending and well grounded apprehension of death or serious bodily harm if the act is not done. *RI Recreation Center v. Aetna Casualty & Surety Co.*, 177 F.2d 603, (CA 6, 1949), *Shannon v. U.S.*, 76 F. 2d 400 (CA 10, 1935), *U.S. v. Anthony*, 145 F.Supp 323 (MD Pa 1956). Wrongful acts of governmental agents (*U.S. v. McClain* (CA9, 1976), 531 F.2d 431, 438) and the demand of the laws of the country (*Tomoya Kawakita v. U.S.*, 1951, U.S. , 72 S.ct 950, 961). Although the FDA had acted arbitrarily and capriciously in wrongfully prohibiting importation of Laetrile (*Rutherford v. U.S.* (CA 10, 1976) 542 F.2d 1137, *Rutherford v. U.S.*, (WD okla, 1977) 424 F.Supp 105), and although substantial evidence of fear of immediate, impending death on the part of laetrile cancer patients, if their Laetrile supply were stopped (R.T. 4948:15-24, 4935:22-4946:22, 5425:14-5427:5, 5426:14-5429:2), the lower court denied petitioner's right to present the defense and thereby denied him a Fair Trial under the accepted legal principles. Petitioner also suggests that there are important similar issues in this case and the *U.S. vs. Rutherford* case Nos. 78-605 and 78-763, presently on appeal to this United States Supreme Court, that warrant the granting of certiorari.

The decision below is in conflict with decisions of the

Court, and decisions of the Fifth and Ninth Circuits.

2. PETITIONER WAS PLACED TWICE IN JEOPARDY FOR THE SAME OFFENSE BY BEING SENTENCED CONSECUTIVELY ON THE TWO CONSPIRACY COUNTS.

Petitioner's indictment contained two conspiracy counts which were identical; they contained the same eight introductory allegations, the same 171 overt allegations, named the same 19 defendants and same 33 unindicted co-conspirators, and enumerated the identical items of contraband. Upon conviction, petitioner was given consecutive fines on these two counts.

Petitioner relied on the test of *Braverman v. United States* (1942) 317 US 49, 63 S.Ct. 99, 101-102, followed in *Iannelli v. United States* (1974), 420 U.S. 770, 777, 95 S.Ct 1284, 43 L.Ed. 2d 616:

> "For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its object. Whether the object of a single agreement is to commit one or more crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."

It must be noted that both conspiracy counts are alleged under the General Conspiracy Statute, 18 U.S.C. section 371, alleging smuggling violations under one statute, 18 U.S.C. section 545.

The Court's reasoning was (Opinion, Appendix, pages 7-8):

"Appellants were convicted of two separate conspiracies; one to smuggle; one to receive and distribute smuggled goods. Bradford and Salaman were sentenced to pay fines for each offense and thus received consecutive sentences. They contend that while the conspiracy involved two substantive offenses, it was but a single agreement and could not be made the basis for two separate counts without violating the double jeopardy clause. They rely on *Braverman v. United States*, 317 U.S. 49, 53 (1942). Before the district court they moved to dismiss the second count. The motion was denied.

The government's theory at trial was that separate and distinct conspiracy agreements had been entered into by McNaughton and his Cyto Pharma group with respect to smuggling and with respect to receiving and distributing, and that these appellants joined both ongoing conspiracies. The government notes that the objects, members and locales of the two conspiracies differed and justified a finding of two conspiracies. It points out that the evidence links some of the co-conspirators to the smuggling operation while others are linked to the distribution operation. Under these facts, 'two distinguishable conspiracies may be charged, prosecuted and punished when the jury so chooses to interpret the evidence.' *United States v. Arteaga-Limones*, 529 F.2d 1183, 1194 (5th Cir.), *cert. denied* 429 U.S. 920 (1976). There the court stated:

'The objects of the two conspiracies were different (importation and distribution). The persons involved were different; for example the evidence links Cantu only to the 'distribution' portion. Finally, the locales were different. Castillo's account alleged that the importation took place in the Del Rio area; the distribution *began* there, but the ultimate consumers of marijuana were in New York.'

United States v. Arteaga-Limones, supra, 529 F.2d at 1194:

> Appellants point out that both conspiracy counts alleged the same overt acts and identical co-conspirators. This does indeed suggest one agreement rather than two, but is not sufficient to establish that facts as matter of law. The question whether there was but one agreement remained one of fact for the jury, *United States v. Roselli*, 432 F.2d 879, 898 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), and was resolved against appellants by the verdict."

Arteaga-Limones, supra, and *Roselli, supra*, do not support the Court's conclusion. An examination of *Arteaga-Limones, supra*, shows that there the defendant was charged with *two separate counts of conspiracy*, one to violate 21 U.S.C. 963, the second to violate 21. U.S.C. 841; and that each conspiracy required different elements of proof. An examination of *Roselli, supra*, shows that defendant was charged with *one* count of conspiracy to violate *two* different statutes (18 U.S.C. 1952 and 2314); and that each conspiracy required proof of the elements of both offenses. The Court of appeals for the Ninth Circuit deciding this case failed to apprehend the distinction between a defendant charged twice under a General Conspiracy statute. The result of this failure has created a conflict between this case and decisions of the Fifth Circuit, Ninth Circuit and United States Supreme Court and emphasizes a most troublesome question in the administration of justice — differentiation between general and specific conspiracy statutes at the trial level.

Petitioner submits that these conflicts justify the grant of certiorary to review the judgment below.

3. PETITIONER'S CONVICTION OF SMUG—

GLING IN COUNT 3 IS IN CONFLICT WITH DECISIONS OF THE FIFTH AND NINTH CIRCUITS.

On September 27, 1973, as the result of an anonymous tip, Customs officials seized 540 vials and 5 kilos of Laetrile at San Francisco airport, and detained one Symonds. While Symonds was detained, annoymous advised of the detention was telephoned to the Committee for Freedom of Choice, and Petitioner made telephone inquiries to Customs as to the seizures (R.T. 5154:6-5454:21, 1325:4-1326:1).

Customs investigations indicated the shipment was consigned to unindicted co-conspirator Westover (R.T. 1225:20-1226:5). No evidence was introduced to establish the Laetrile had been smuggled; Customs agents conceded it could have been legally imported (R.T. 1323:9-1324:8); and Laetrile was being legally imported upon occasion (R.T. 4668:16-4702:24; 5166:8-5172:1; 6803:5-12; 6165:19-6191:7; 5650:21-5651:5; 4969:10-5039:12; 4885:12-4894:10).

The Fifth Circuit held in *Sherman v. United States* (CA 5, 1920), 268 F. 516, 517-518:

> "The presumption which is raised by the foregoing statute is simply that, where possession of goods which have been proved to have been imported contrary to law is shown, the burden of explaining such possession is placed upon the defendant. *But the statute does not raise any presumption that the goods were imported contrary to law.* The burden of proving this fact beyond a reasonable doubt rests upon the government. *United States v. Lot of Jewelry*, 13 Blatchf. 60, Fed. Cas. No. 15,626." ..... The case is purely one of circumstantial evidence, and the rule in such cases is that the proof shall exclude every other reasonable hypothesis, except the guilt of the accused. *Wright v. United States, States*, 146 Fed 121, 76 C. C. A. 547."

In *U.S. v. Meyer* (CA9, 1970), 432 F.2d 1000, the Ninth Circuit reversed a smuggling conviction where Mexican seconol was found concealed in the truck of an automobile in which Meyer was a passenger 65 miles from the border. The Meyer Court observed (at page 1001):

> "Illegal importation of merchandise and knowledge of the fact are essential elements of the crime of which Meyer was convicted. But here there is no evidence to establish either. The most that can be inferred from this evidence is that four of the boxes probably came from Mexico. Whether the boxes contained the seconol capsules were illegally imported are matters of pure conjecture. Similarly, there is no proof of Meyer's scienter. Mere possession of illegally imported merchandise does not prove the possessor's knowledge of its illegal importation. Nor can the conviction be rested upon the portion of 18 U. S. C. section 545, which provides that possession of imported merchandise is sufficient evidence to authorize a conviction. The presumption created by that section does not arise, save on proof that the particular goods were unlawfully imported. *Kennedy v. United States*, 44 F. 2d 131 (9th Cir. 1930); *Sherman v. United States*, 268 F. 516 (5th Cir. 1920) (interpreting former 19 U.S.C. Section 1593, which was the predecessor of section 545)."

The conflict between the decision in petitioner's case and decisions in the Fifth and Ninth Circuits justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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January 4, 1979

In the
United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN ANTON RICHARDSON,
RALPH S. BOWMAN,
FRANK SALAMAN,
ROBERT WILLIAM BRADFORD,

Defendants-Appellants.

Nos. 77-2203
77-2204
77-2262
77-2288

OPINION

On Appeal from the United States District Court for the Southern District of California

Before: MERRILL and ANDERSON, Circuit Judges, and BARTELS,* District Judge

MERRILL, Circuit Judge:

Laetrile is a substance (drug or vitamin) around which controversy for some time has raged as to whether it provides effective cure of or relief from cancer. The Food and Drug Administration has classified it as a "new drug" under 21 U.S.C. §321(p): a drug not generally recognized by experts to be safe and effective. Under 21 U.S.C. §355(b) as a result of this classification an application for approval of the new drug must be filed and the new drug cannot be transported in interstate commerce without such approval.[1] Approval

* Honorable John R. Bartels, Senior United States District Judge of the Eastern District of New York, sitting by designation.

so far has been withheld, which precludes importation of the drug and limits distribution of it in this country.

This case involves a conspiracy to smuggle the drug into the United States from Mexico and thereafter to distribute the smuggled merchandise. A twelve-count indictment was returned by a grand jury in the Southern District of California charging these four appellants and fifteen other codefendants with two conspiracies — one to smuggle merchandise and one to receive, buy, sell, transport and conceal the smuggled merchandise, both in violation of 18 U.S.C. §§371 and 545 — and also charging various substantive offenses. The trial of these appellants was severed from that of their codefendants. All four were found guilty of the two conspiracy counts. Appellant Bradford also was found guilty of three substantive counts: two of smuggling and one of receiving, concealing and facilitating the transportation of smuggled merchandise.

The record establishes that in 1971 one McNaughton (a codefendant) was engaged in a chemical manufacturing business in Sausalito, California. He decided to move his plant to Tiajuana, Mexico, and there to manufacture Laetrile. The plant was established under the name of Cyto Pharma. One Contreras (a codefendant) who maintained a cancer clinic in Mexico became coowner of the enterprise. One Greczy (a coconspirator) who had acted as chemist for McNaughton in Sausalito, and two Del Rio brothers from Mexico (codefendants) were placed in charge of the plant. At the outset the plant produced only for Contreras' clinic. A surplus developed, however, and in the fall of 1971 it was decided by McNaughton, Contreras, Greczy and the Del Rios that the surplus should be brought into the United States for distribution. Since Customs officials regularly seized all declared Laetrile, this meant that the Laetrile would have to be smuggled in. One Thurston (coconspirator) was designated to act as distributor for McNaughton in the United States. Evi-

dence as to the manner in which the conspiracy operated came from correspondence of Thurston seized under a state search warrant and from testimony of Greczy and numerous other codefendants, many of whom had actually brought Laetrile across the border and some of whom had engaged in knowing distribution.

Appellant Richardson is a medical doctor engaged in practice in Albany, California. Appellant Bowman is his office manager. Appellants Bradford and Salaman are active members of the Committee for Freedom of Choice in Cancer Therapy, which is engaged in seeking to remove the FDA classification of Laetrile or to secure its approval.

Government Misconduct

Here, as in the district court, appellants seek to secure judicial recognition of the legitimacy of the use of Laetrile in the treatment of cancer. They contend that the FDA classification and its withholding of approval for Laetrile amounted to governmental misconduct. These questions, however, are not properly before us. Appellants were not convicted for possessing or using Laetrile but for conspiring to smuggle it, in violation of 18 U.S.C. §545. That section makes it a crime knowingly and wilfully, with intent to defraud the United States, to smuggle or clandestinely introduce into the United States any merchandise that should have been invoiced. This court has held that the term "invoiced" in §545 "carries the meaning attached to it in the customs law, viz., lawfully entered or declared." *United States* v. *Boggus*, 411 F.2d 110, 112 (9th Cir.), *cert. denied*, 396 U.S. 919 (1969). The United States customs law as detailed by the Tariff Act of 1930, 19 U.S.C. §1202 *et seq.*, requires a person entering the United States from a foreign country to declare and present for inspection all merchandise imported or brought in from a foreign country. 19 U.S.C. §§1459, 1461, 1481, 1485.

Thus, one bringing goods into the country who fails to properly declare or present the goods as required by the Act violates 18 U.S.C. §545, whether importation of the merchandise was legal or illegal, *cf. United States* v. *Kushner*, 135 F.2d 668, 670 (2d Cir.), *cert. denied*, 320 U.S. 212 (1943) (duty free gold). Appellants do not contest the fact that one entering the country is obliged to declare any Laetrile he is bringing in. Thus the fact that the FDA may have improperly classified Laetrile as a new drug is irrelevant to a conviction for smuggling.[2]

Justification

Appellants content that since Laetrile, when declared at the border, was regularly seized by Customs officials it could not be brought into the United States unless smuggled. Further they contend that it was needed in the United States to treat cancer patients. On these facts they invoke the defense of necessity or "choice of evils," traditionally a branch of the common-law doctrine of justification.

This defense is said to be available when the actor is faced with a choice of two evils and finds himself in a position where he may "either do something which violates the literal terms of the criminal law and thus produce some harm or not do it and so produce a greater harm." LaFave and Scott, *Handbook on Criminal Law* (1972) §50, page 387. Thus it is asserted that society will benefit from the greater good that is accomplished by the violation of the literal language of the law. *United States* v. *Simpson*, 460 F.2d 515, 517-18 (9th Cir. 1972).

The defense of necessity, where it is recognized to exist, is hedged about with many conditions, at least one of which would prevent its application here: "[T]he assertion of the necessity defense requires that optional of action appear unavailable." *United States* v. *Mowat*, ____ F.2d ____, ____ (9th Cir. July 18, 1978).

Here the obvious optional course of action was to take

steps to render the "necessary" action legal — to pursue the course taken in *Rutherford* v. *United States, supra* note 1, in seeking to have the FDA classification of Laetrile set aside or to have it approved as a new drug. If it was felt that classification as a new drug does not justify seizure of Laetrile declared at the border, the seizure could have been legally challenged. Also, as the government suggests, another alternative was the production of Laetrile in the United States.

We conclude that there is no merit in this contention of appellants.[3]

Sufficiency of the Evidence

Appellants Salaman, Richardson and Bowman contend that their conspiracy convictions were not supported by sufficient evidence. While the evidence clearly established that the Cyto Pharma group had entered into a conspiracy to smuggle and that appellants had received smuggled Laetrile and then distributed it among themselves and to others, appellants urge there is insufficient evidence tying them to the conspiracy. Their basic defense to the charge was that they believed that the Laetrile had been lawfully imported.

Viewing the evidence and the inferences reasonably to be drawn from it in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), there is sufficient evidence to support the jury's verdict and the finding implicit in it that appellants knowingly participated in the conspiracy.[4]

Appellant Bradford contends that his convictions on the substantive counts of smuggling and receiving were not supported by sufficient evidence. He presents two basic defenses; one, that the government did not establish that the Laetrile in question was unlawfully in the United States; and two, that the government did not establish that Bradford knew the Laetrile in question was smuggled.

While there was no direct evidence of illegal importation of the shipments in question or of Bradford's knowledge, there is ample circumstantial evidence to support the jury's verdict. Circumstantial evidence is sufficient to establish illegal importation. *See United States* v. *Scott*, 446 F.2d 509, 510 (9th Cir. 1971); *United States* v. *Gibbs*, 435 F.2d 621, 624 (9th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971). It is also sufficient to establish knowledge of illegal importation. *United States* v. *Newton*, 442 F.2d 622, 623 (9th Cir.), *cert. denied*, 404 U.S. 844 (1971). Evidence respecting the counts in question is dealt with at length in the government's brief and we do not choose to burden this opinion with an extended discussion of it. It is enough to note that the connection between Bradford and Cyto Pharma was clearly established by the testimony of couriers and telephone records of Bradford. The Laetrile in question had been manufactured at Cyto Pharma. The shipments followed the methods of operation proved to be followed by Cyto Pharma couriers. On each occasion there was similar coincidence of arrest of courier, seizure of shipment and communication between Bradford and Cyto Pharma. On one occasion Bradford called Customs and requested to have the shipment released to him.

We conclude that the evidence supported the jury verdict on all convictions.

Consecutive Sentences as Double Jeopardy

Appellants were convicted of two separate conspiracies: one to smuggle; one to receive and distribute smuggled goods. Bradford and Salaman were sentenced to pay fines for each offense and thus received consecutive sentences. They contend that while the conspiracy involved two substantive offenses, it was but a single agreement and could not be made the basis for two separate counts without violating the double jeopardy clause. They rely on *Braverman* v.

United States, 317 U.S. 49, 53 (1942). Before the district court they moved to dismiss the second count. The motion was denied.

The government's theory at trial was that separate and distinct conspiracy agreements had been entered into by McNaughton and his Cyto Pharma group with respect to smuggling and with respect to receiving and distributing, and that these appellants joined both ongoing conspiracies. The government notes that the objects, members and locales of the two conspiracies differed and justified a finding of two conspiracies. It points out that the evidence links some of the coconspirators to the smuggling operation while others are linked to the distribution operation. Under these facts, "two distinguishable conspiracies may be charged, prosecuted and punished when the jury so chooses to interpret the evidence." *United States* v. *Arteaga-Limones*, 529 F.2d 1183, 1194 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976). There the court stated:

> "The objects of the two conspiracies were different (importation and distribution). The persons involved were different; for example, the evidence links Cantu only to the 'distribution' portion. Finally, the locales were different. Castillo's account alleged that the importation took place in the Del Rio area; the distribution *began* there, but the ultimate consumers of the marijuana were in New York."

United States v. *Arteaga-Limones, supra*, 529 F.2d at 1194.

Appellants point out that both conspiracy counts alleged the same overt acts and identical coconspirators. This does indeed suggest one agreement rather than two, but is not sufficient to establish that fact as matter of law. The question whether there was but one agreement remained one of fact for the jury, *United States* v. *Roselli*, 432 F.2d 879, 898 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), and was resolved against appellants by the verdict.

Other Assignments of Error

Richardson and Bowman contend that it was error to rule that if they took the stand they could be cross-examined concerning their income tax returns. They assert that this ruling in effect prevented them from testifying. The ruling, however, was preliminary and tentative and did not amount to a denial of right to testify. *See, e.g., United States* v. *Fulton*, 549 F.2d 1325, 1327 (9th Cir. 1977); *United States* v. *Murray*, 492 F.2d 178, 197 (9th Cir. 1973), *cert. denied*, 419 U.S. 942 (1974).

Denial of Salaman's motion for severance was not rendered abuse of discretion by the subsequent admission of evidence against Bradford. No objection was made to the admission of evidence and the motion for severance was not renewed at the close of evidence, and therefore was not preserved on appeal. *United States* v. *Gaines*, 563 F.2d 1352, 1355-56 (9th Cir. 1977).

Appellants Bradford and Salaman urge they were denied a fair trial by the failure of the trial court to grant them leave to take the depositions of certain Mexican nationals. We disagree. It is within the sound discretion of the trial court to grant or deny a motion to depose a proposed witness in a criminal trial. *See United States* v. *Nichols*, 534 F.2d 202, 204 (9th Cir. 1976). Federal Rule of Criminal Procedure 15 (a) provides that a trial court may permit depositions when "it is in the interest of justice." It has been held that it would work an injustice to allow the deposition of fugitive codefendants. *See United States* v. *Kelly*, 349 F.2d 720, 769 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United Stated* v. *Murray, supra*, 492 F.2d at 195. Three of the Mexican nationals were fugitive codefendants and one was an unindicted coconspirator whose location was unknown. Under these circum-

stances it was not an abuse of discretion to deny the motion to depose. *United States* v. *Murray, supra*, 492 F.2d at 195.

Bradford did not move to suppress the fruits of a search of his car and cannot now, on appeal, raise the issue of the legality of that search. *United States* v. *Wysong*, 528 F.2d 345, 348 (9th Cir. 1976).

It was not error to deny Salaman's motion for an order granting use immunity to persons he desired to call as witnesses. The court has no power to make such a grant. *United States* v. *Benveniste*, 564 F.2d 335, 339 n. 4 (9th Cir. 1977).

We find no merit whatsoever in Salaman's contention that in permitting him to represent himself the court denied him adequate representation. The court repeatedly and adequately warned him of the dangers of self-representation and he repeatedly persisted in asserting his right to represent himself. *See Faretta* v. *California*, 422 U.S. 806 (1975).

We find no merit in the contentions of Richardson and Bowman that they were deprived of fair trial by a cumulation of rulings and incidents during trial, or the contentions of Bradford and Salaman that there were numerous instances of prosecutorial misconduct. In neither instance do we find the cumulation to result in prejudice of any consequence.

There was no improper prosecutorial comment on Bradford's failure to testify. The comment was no more than an objection to Bradford's questioning of witnesses in such a leading fashion as to amount to the giving of unsworn testimony himself and was not of such a character that a jury would take it as a comment on the failure of Bradford to testify. *See United States* v. *Cornfield*, 563 F.2d 967, 971 (9th Cir. 1977), *cert. denied*, ____ U.S. ____ (1978). In fact, the prosecutor's objection was made at a time when it was not yet clear that Bradford would not testify.

Judgment affirmed.

FOOTNOTES

1. *(Page 1).* This classification was challenged by a group of cancer victims in *Rutherford* v. *United States*, 399 F.Supp. 1208 (W.D.Okla. 1975). There the district court enjoined the FDA from preventing the plaintiffs from obtaining Laetrile. The Tenth Circuit agreed that the FDA had failed to produce an administrative record to support its classification of Laetrile as a new drug and remanded for further proceedings to determine whether Laetrile was "grandfathered" under previous Food and Drug Acts. 542 F.2d 1137, 1142 (10th Cir. 1976). The FDA then held hearings, again finding that Laetrile was an unapproved new drug and was not exempt under the grandfather provisions. On review of that decision, in *Rutherford* v. *United States*, 438 F.Supp. 1287 (W.D.Okla. 1977), the district court found the agency's classification to be arbitrary, capricious and an abuse of discretion because the record clearly established that Laetrile was exempt under the 1962 grandfather clause of the FDA. 438 F.Supp. 1287, 1294-98. It enjoined the FDA from enforcing the new drug statutes in regard to Laetrile, specifically prohibiting the FDA and the Customs Service from interfering with the importation of Laetrile. 438 F.Suppl. 1287, 1301.

On the second appeal the Tenth Circuit did not discuss the grandfather clause issue which formed the basis of its first opinion in the case, but instead adopted a new theory, stating:

> "We are considering only cancer patients who are terminally ill and only their intravenous use of Laetrile. * * * What meaning can 'effective' have in the absence of anything which may be used as a standard? Under this record Laetrile is as effective as anything else. What can 'effective' mean if the person, by all prevailing

standards, and under the position the Commission takes, is going to die of cancer regardless of what may be done. Thus there has been no standard here advanced by the Commission against which to measure the safeness or effectiveness of the drug as to the plaintiffs. Clearly the terms have no meaning under these circumstances, and certainly not the abstract meaning sought to be applied by the Commission. * * *

* * * *

Therefore, we hold as a matter of law that the 'safety' and 'effectiveness' requirements of the statutes as now written have no application to terminally ill cancer patients who desire to take the drug intravenously."

____ F.2d ____, ____ (10th Cir. July 10, 1978). Thus the Tenth Circuit did not decide whether the district court was correct in holding that Laetrile could not be classified as a new drug.

2. *(Page 4)* Other convictions for smuggling Laetrile have recently been affirmed by this court. *United States* v. *Luther*, 521 F.2d 408, 409 (9th Cir. 1975); *United States* v. *Westover*, 511 F.2d 1154, 1156 (9th Cir.), *cert. denied*, 422 U.S. 1009 (1975).

3. *(Page 5)* On this defense and on that of government misconduct, appellants sought to introduce much evidence bearing on the validity of Laetrile as a cancer drug and their contentions that the FDA classification was improper. The district court, after hearing, refused to allow the evidence to be introduced. Appellants assign this as error. Appellants were allowed to make an extensive offer of proof, however. For the reasons set forth in our opinion the defenses were not available and the offered proof was not relevant.

4. *(page 6)* We refer to a few among many items. Salaman both received and shipped packages of Laetrile with false identifying information. One courier testified to making deliveries to Salaman at the airport in San Jose where she would be driven to a secluded part of the airport and would be paid in cash. On one trip, when Salaman refused most of the shipment, the courier asked, "How do you expect me to pay the people that smuggled it?"

Bowman told an IRS agent that two checks on Richardson's account made out to cash were used to pay for the smuggling of Laetrile into the United States. Over 90 percent of the Laetrile used by Richardson was manufactured at Cyto Pharma. There was evidence that his account at Cyto Pharma was personally handled by one of the Del Rio brothers. There was evidence that he once told a coconspirator that he obtained his Laetrile in the same way that appellant Bradford obtained his. Since, as appellants complain in discussing other assignments of error, it was not possible to get Laetrile across the Mexican border without smuggling it, it would seem most unlikely that Richardson and Bowman did not know that they were dealing with smuggled goods.

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No. 78-1127

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1978. A petition for rehearing was denied on December 18, 1978. The petition for a writ of certiorari was filed on January 18, 1979, and is therefore one day out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution based on smuggling and distribution of Laetrile, the district court properly

excluded evidence purporting to show that Laetrile is beneficial to cancer patients.

2. Whether the Double Jeopardy Clause barred separate convictions for conspiracy to smuggle Laetrile and conspiracy to distribute Laetrile.

3. Whether the evidence was sufficient to show that Laetrile had been smuggled into the United States as charged in Count 3 of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to smuggle merchandise, and one count of conspiracy to receive, buy, sell, transport, and conceal smuggled merchandise, in violation of 18 U.S.C. 371 and 545. He was also convicted on three substantive counts of smuggling and receiving smuggled merchandise, in violation of 18 U.S.C. 545. Petitioner was sentenced to three years' probation and fined $40,000.[1] The court of appeals affirmed (Pet. App.).

The evidence at trial showed that Cyto Pharma, a chemical manufacturing plant in Tijuana, Mexico, produced a surplus quantity of Laetrile that its owners decided to sell in the United States. Because customs officials seize all declared Laetrile, the operators of Cyto Pharma set up a smuggling operation and transported Laetrile into the United States on at least 14 separate occasions (Tr. 454-469, 489-498, 504-510, 529-538, 617-622, 637-648, 658-662, 664-673, 1092-1101, 1106-1113, 1143-1148, 1156-1167, 1184-1193, 2316-2317, 2406-2407, 2840-3148).

[1] A 12-count indictment was returned against petitioner and 18 other defendants. The trial of petitioner and three co-defendants was severed from that of the others. These four were each found guilty on the two conspiracy counts, sentenced to three years' probation, and fined. The court of appeals affirmed all four convictions, and this Court subsequently denied the petition for certiorari of co-defendants Richardson and Bowman (No. 78-1209) (March 5, 1979).

The evidence established petitioner's extensive involvement in this scheme. On September 27, 1973, customs agents received an anonymous tip that a blue samsonite suitcase would arrive in San Francisco from San Diego containing smuggled Laetrile (Tr. 1196, 1200, 1229, 1247). Such a suitcase did arrive later that day and was claimed by co-defendant Hector Guillermo Symonds-Gonzalez (Tr. 1263, 1273, 1287-1290). Symonds agreed to let customs officials search the bag (Tr. 1264, 1269-1270, 1296, 1299-1301). They seized 540 vials of Laetrile and 11 pounds of Laetrile pills, all from Cyto Pharma (Tr. 1270-1279, 1302-1303, 1323). Approximately one hour later, petitioner called the San Francisco customs office inquiring about the suitcase and the Laetrile (Tr. 1202-1203, 1209, 1211, 1252-1257). Petitioner was informed that the bag had been seized (Tr. 1203). He thereupon called the airport customs office and asked if the Laetrile could be released to him (Tr. 1273-1275). Neither petitioner nor Symonds could produce any documentation to show that customs duties had been paid for the Laetrile contained in the suitcase (Tr. 1250, 1256, 1313-1316, 1325).

A similar incident occurred on November 5, 1974, when co-conspirator Beverly Newkirk attempted to ship 600 vials and 4 pounds of Laetrile pills by air freight in packages falsely designated as "printed material" (Tr. 2898-3043). Airline employees noticed the sound of liquid coming from the packages, opened them, and discovered the Laetrile (Tr. 2913, 2923-2926, 2953). The next morning, airline employees notified Newkirk that the shipment was being held at the airport (Tr. 2933-2938, 2951-2955). Later that morning, petitioner arrived at the airport, identified himself as the shipper, and asked to take the shipment with him (Tr. 2938-2939, 2959-2960, 2989-2993, 3005, 3045-3050).

Other evidence showed that petitioner personally received at least two deliveries of the smuggled Laetrile and that he was involved in reselling the drug (Tr. 2430, 2541-2545, 2940-2957, 3432-3443). Testimony of two different witnesses also established that petitioner knew that the Laetrile had been smuggled across the border. Lidia Ramirez, who delivered smuggled Laetrile to petitioner, testified that she explained to him that the high price of the Laetrile was due to the fact that couriers had to be paid to bring the drug across the border (Tr. 2857-2858, 3115-3116); Elaine Pricola testified that petitioner admitted to her that the Laetrile had been smuggled into the country (Tr. 3442-3443).

Petitioner's books and records showed that he realized a gross profit of $642,556 on 729 shipments of merchandise, most of which was Laetrile (Tr. 3963, 3965, 4051-4096).

ARGUMENT

1. Petitioner argues (Pet. 4-8) that the trial court erred in excluding evidence purporting to show that Laetrile has analgesic and curative properties useful in the treatment of cancer. That evidence, petitioner contends, would support a defense of coercion or necessity because it would show that his smuggling operation was justified by the need to treat cancer patients.

This claim was properly rejected by the courts below. The defense of coercion requires the defendant to show that another person's unlawful threat caused him to fear immediate and otherwise inescapable danger of death or serious bodily injury. See, *e.g.*, *United States* v. *Housand*, 550 F. 2d 818, 824-825 (2d Cir.), cert. denied, 431 U.S. 970 (1977); *D'Aquino* v. *United States*, 192 F. 2d 338, 357-358 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); *United States* v. *Patrick*, 542 F. 2d 381, 386-387 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *Shannon* v. *United States*, 76 F. 2d 490, 492-493 (10th Cir. 1935). See also LaFave and Scott, *Criminal Law* 374 (1972). Petitioner's proffered evidence would not support the inference that his actions were "coerced" within this definition.

Petitioner's related contention that his smuggling operation was "necessary" to save the lives of other persons is equally unsupported. Violations of the law cannot be justified under the necessity doctrine where alternative lawful courses of action are available to achieve the same purposes. See, *e.g.*, *United States* v. *Mowat*, 582 F. 2d 1194, 1208 (9th Cir. 1978), cert. denied, No. 78-5276 (Nov. 13, 1978). See also LaFave and Scott, *supra*, at 387-388. As noted by the court of appeals, an alternative course of action was available to petitioner here: "[T]he obvious optional course of action was to take steps to render the 'necessary' action legal—to pursue the course taken [by other Laetrile proponents] in seeking to have the FDA classification of Laetrile set aside or to have it approved as a new drug" (Pet. App. 4-5).[2] In simple terms, the necessity doctrine is not a mandate to disobey laws that the defendant believes to be contrary to the general public welfare:

> . The common thread running through most of these cases in which the defense of necessity was asserted is that there was a reasonable belief on the part of the defendant that it was necessary for him to act to protect his life or health, or the life or health of others, from a direct and immediate peril. None of the cases even suggests that the defense of necessity would be

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[2]The plaintiff-cancer patients in *United States* v. *Rutherford*, No. 78-605 (cert. granted Jan. 22, 1979), have followed that course. There is, of course, no need to hold the instant petition pending the decision in *Rutherford*, since the charge against petitioner is smuggling merchandise into the United States in violation of the customs laws. The decision in *Rutherford* will have no bearing on the issues presented here.

> permitted where the actor's purpose is to effect a change in governmental policies which, according to the actor, may in turn result in a future saving of lives.

United States v. *Kroncke*, 459 F. 2d 697, 701 (8th Cir. 1972).[3]

2. Petitioner also contends (Pet. 8-10) that his convictions on two conspiracy counts violated the Double Jeopardy Clause of the Fifth Amendment.

Petitioner was separately charged with conspiracy to smuggle merchandise, and conspiracy to receive, buy, sell, transport, and conceal smuggled merchandise, in violation of 18 U.S.C. 545 and 371. It is well settled that separate violations may result if separate conspiracies are proven. See, *e.g.*, *United States* v. *Arteaga-Limones*, 529 F. 2d 1183, 1194 (5th Cir.), cert. denied, 429 U.S. 920 (1976); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787-788 (1946); *Braverman* v. *United States*, 317 U.S. 49, 52-53 (1942). The question whether there was one or two conspiracies was a question of fact for the jury, and there is no claim here that the jury was improperly instructed. See *United States* v. *Roselli*, 432 F. 2d 879, 898 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). As noted by the court of appeals, the evidence proving separate conspiracies was sufficient in this case (Pet. App. 7):

[3]Cases of "necessity" arise when forces of nature (*e.g.*, storms or famines) compel disobedience of a legal rule to avoid a greater injury to human life or safety. LaFave and Scott, *supra*, at 381. The FDA's prohibition against distribution of Laetrile does not give rise to "necessity" to violate federal customs laws. See *id.* at 382: "The defense of necessity is available only in situations wherein the legislature has not itself * * * made a determination of values. If it has done so, its decision governs."

> The government's theory at trial was that separate and distinct conspiracy agreements had been entered into by McNaughton and his Cyto Pharma group with respect to smuggling and with respect to receiving and distributing, and that these appellants joined both ongoing conspiracies. The government notes that the objects, members and locales of the two conspiracies differed and justified a finding of two conspiracies. It points out that the evidence links some of the coconspirators to the smuggling operation while others are linked to the distribution operation. Under these facts, "two distinguishable conspiracies may be charged, prosecuted and punished when the jury so chooses to interpret the evidence."[4]

3. Petitioner also contends (Pet. 11-12) that the evidence failed to show that the Laetrile described in Count 3 of the indictment actually entered the United States from another country.

However, the fact of illegal importation may be established by circumstantial evidence. See, *e.g.*, *United States* v. *Scott*, 446 F. 2d 509, 510 (9th Cir. 1971); *United States* v. *Gibbs*, 435 F. 2d 621, 624 (9th Cir. 1970), cert. denied, 401 U.S. 994 (1971); *United States* v. *Ingham*, 502 F. 2d 1287, 1290-1291 (5th Cir. 1974), cert. denied, 421 U.S. 911 (1975). The evidence in this case showed that on September 27, 1973, as a result of an anonymous tip, customs officials seized 540 vials and 11 pounds of Laetrile at the San Francisco airport. Thereafter, petitioner made telephone calls to the customs officials

[4]Petitioner's assertion that the decision below conflicts with *Braverman* v. *United States*, *supra*, and *United States* v. *Roselli*, *supra*, is unsupported. In those cases, the evidence showed a single conspiracy. In the present case, two separate conspiracies were proven by the government.

attempting to claim the Laetrile. Other testimony established that petitioner participated repeatedly in the smuggling operation, that the smuggling operation originated from Tijuana, and that petitioner was well aware of the movement of the Laetrile across the Mexican border. The jury could infer from this evidence that the Laetrile involved in Count 3 had been smuggled into the United States.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

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[5]Because the evidence was sufficient to show illegal importation, the cases of *Sherman* v. *United States*, 268 F. 516 (5th Cir. 1920), and *United States* v. *Meyer*, 432 F. 2d 1000 (9th Cir. 1970), relied on by petitioner (Pet. 11-12), are inapposite.

DOJ-1979-04